APPENDIX.

RELEVANT DOCKET ENTRIES IN THE COURT OF COMMON PLEAS OF CUYAHOGA COUNTY, OHIO, CASE NO. 81,317.

December 1, 1964: To Court: This day came the Jurors of the Grand Jury and having found, now present to the Court by and through their foreman, certain Bills of Indictment, against the following named persons for the following indicated crimes or offenses and endorsed by said foreman "A True Bill" and signed by him as foreman aforesaid and enumerated as follows:

81317 State of Ohio vs. Alexander Birns Indictment —Bribery w/c Attempt to Influence Wit. (Jr. 105-611.)

December 6, 1965: To Court: It is hereby ordered by the Court that this case is continued for trial to December 7, 1965. Charles W. White, Judge. (Jr. 108-462.)

December 8, 1965: To Court: * * * It being proper in the opinion of the Court for the jury to view the place where the crime occurred, it is ordered that the said jury be conducted in a body to the said place and the same shown to the jury in this case.

And the hour of adjournment having arrived, this case is continued until tomorrow morning. John L. Angelotta, Judge. (Jr. 108-477)

December 22, 1965: To Court: This day again came the Prosecuting Attorney on behalf of the State, and defendant Alexander Birns was brought into court, represented by counsel; also came the jury, duly impaneled and sworn, and retired to their room for further deliberation.

And now come the jury, conducted into court by the bailiff, and return the following verdict in writing, to-wit: "We, the jury in this case, being duly impaneled and sworn, do find defendant Alexander Birns guilty of bribery as charged in the first count of the indictment";

and, "We the jury in this case, being duly impaneled and sworn, do find defendant Alexander Birns guilty of attempt to influence witness, as charged in the second count of the indictment."

Thereupon, the Court informed the defendant of the verdict of the jury, and inquired of him if he had anything to say why judgment should not be pronounced against him, and he having nothing but what he hath already said:

It is, therefore, ordered and adjudged by the Court that defendant Alexander Birns be imprisoned and confined in the Ohio Penitentiary, Columbus, Ohio, for an indeterminate period, and that he pay the costs of this prosecution, for which execution is awarded.

It is further ordered that sentences on counts herein be served concurrently.

It is also ordered by the Court that execution of sentence in this case is stayed pending filing and hearing on motion for new trial. Defendant is released on same bond. J. L. Angelotta, Judge. (Jr. 108-544.)

December 28, 1965: Motion for New Trial, filed.

January 10, 1966: To Court: It is hereby ordered by the Court that defendant's Motion for new trial is overruled as to all branches. Defendant is released on his same bond. John L. Angelotta, Judge. (Jr. 109-129.)

January 21, 1966: Notice of Appeal on questions of Law, filed. Precipe, filed.

March 21, 1966: Motion for New Trial on Newly Discovered Evidence, filed. Exhibits A-B-B1-B2-C-D-E-F-G-H-I, filed.

May 6, 1966: To Court: This day again this cause came on for hearing on defendant's Motion for New Trial based on Newly Discovered Evidence, and the Court upon

hearing and full consideration, overruled said motion. J. L. Angelotta, Judge. (Jr. 113-71.)

May 23, 1966: Notice of Appeal and precipe, filed.

RELEVANT EXCERPTS FROM THE RECORD IN THE COMMON PLEAS COURT OF CUYAHOGA COUNTY, OHIO, CASE NO. 81,317.

(11) Tuesday, December 7, 1965, at 9:15 a.m.

* * * * *

Thereupon a jury was duly impaneled and sworn.

* * * * *

Thereupon the following proceedings were had:

The Court: * * * I will tell you at this time that counsel have asked for what we call a view of the scene, so that immediately after what I have to say to you in the morning you will be either escorted by taxicab or bus—I don't know what Mr. Satullo has for us—but you will be going to the scene of the alleged offense and then when you return here we will proceed with the part of the trial that is conducted here in the courtroom.

* * * * *

(20) Ladies and gentlemen, I told you late yesterday that we were going to ask you to view the scene of this alleged offense, and I would now like to relate my comments to that subject.

You will visit the scene involved in this case. You will be under the supervision of the bailiff. That will be Mr. Dudek. At all times. You will remain together until you are returned to the courtroom or otherwise excused by Mr. Dudek. The fact is, you will be returned to the courtroom, however.

* * * * *

(21) What you see at the scene is not evidence. The conditions may or may not have been changed since the time of the events in this case. The evidence as to the physical appearance of the scene must come to you from the witness stand.

* * * * *

(22) The Court: Mr. Donley, will you have the record show that the request to view the scene was made by counsel for the State of Ohio.

Mr. Garmone: And agreed to by counsel for the defendant.

The Court: And agreed to by counsel for the defendant.

* * * * *

(23) (Thereupon the jury viewed certain locations in the City of Parma.)

(Thereupon the following transpired out of the presence of the jury:)

Mr. Day: The defense objects to the Court order allowing the jury in the instant case to view the scene of the alleged crime in Case No. 80,677 for the reason that such view is not essential to the presentation of the evidence of a pending indictment in the last-named case and is prejudicial to the present case because it brings before the jury the facts of an alleged crime in a dramatic and sensational fashion unnecessary to the State's presentation, and moreover does so after the evidence in the original case No. 80,677 had been suppressed, including all evidence as to the manner of execution of a warrant at the premises of 5715 Vulcan Avenue, which in the view of the defense means that nothing with respect to those physical premises is relevant or admissible in the present case, and prejudicial to the defendant in the case now in trial.

* * * * *

(26) The Court: * * * and of course the Court hasn't heard the State's evidence at this time and there is nothing we can do at this time to rule out the view, which is a discretionary matter.

Mr. Day: May I add something so that I don't foreclose my right. The basis of the defense opposition and objection is both an abuse of discretion by the Court under the existing state statutes and a violation of the Fourteenth Amendment to the Federal Constitution, because the interjection of an irrelevant view is a contravention of due process under the Fourteenth Amendment and under the equivalent clause in the Ohio Constitution.

* * * * *

(27) The Court: Thank you, Mr. Fleming. Anything further, gentlemen?

Mr. Day: Only this, that the granting of a view of the premises at 5715 Brookpark interjects an emphasis which impinges upon due process, and this is in part theoretical argument in connection with the Constitutional violation.

The Court: Gentlemen, the request for the view was made and the request was granted, and the objections are now part of the record. We will proceed.

Mr. Day: If your Honor please, can the record show that although chronologically in the record our objection comes after the view was concluded, we did in fact raise with the Court the objections we now make, and were assured over the telephone, because we were then at the scene and had not anticipated that (28) the view at 5715 Brookpark was going to take place until that moment, we were assured that we could reserve our objections and make them when we returned to the courtroom and had a reporter present? May the record show that?

The Court: The record does show it, and it may show it, and it is a correct statement.

* * * * *

(29) Mr. Day: We had assumed a view of the premises that had something to do with this case and not a view of the premises that had nothing to do with it.

* * * * *

The Court: Gentlemen, this is what the Court agrees with, as it relates to your comments, Mr. Day.

While you were away on your visit to the premises or view of the scene, the Court did receive a telephone call. Mr. Fleming told me that you had already been to the Beef & Bottle, you were about to go to 5715 Brookpark, and that counsel for the defense objected to this, and the Court ordered that you could (30) and would go to 5715 Brookpark, and I did tell Mr. Day that whatever objection he might have to that he could recite for the record upon your return to the courtroom, and that is what has been done.

What the understanding or agreement was prior to your going out there is a matter of record. It was the Court's understanding that you were going to view the scene at the Beef & Bottle and at 5715 Brookpark. I can't honestly say that it was delineated as I just delineated it. I am not saying that it was not delineated that way. I just don't recall, and I can only tell you what my impression was when the jury and you gentlemen and Mr. Birns left here and went where you went.

* * * * *

(38) Mr. Day: We will object in opening statement or in evidence to any reference to anything about the clearing house arrest except the introduction of the indictment itself. That is all that is essential to the State's case, and we may even object to that, but we think we would lose on that objection, but no others.

* * * * *

(39) The Court: You may proceed, Mr. Fleming.

Mr. Fleming: If it please the Court, the evidence will show that the defendant was a convict who was known to have been in the numbers activity.

Mr. Day: Objection.

Mr. Fleming: Specifically clearing house.

The Court: Overruled.

(40) Mr. Fleming: The evidence will further show that the police had reason to believe by virtue of information they had in their possession, as well as an investigation conducted by the Parma and Cleveland Police Departments, that this defendant's operations had extended to Parma.

Mr. Day: Objection.

The Court: Overruled.

Mr. Day: That evidence has been suppressed, your Honor, and one of the grounds was that they did not have adequate reason to believe—

Mr. Fleming: That evidence has not been suppressed, your Honor, and Mr. Day knows it.

Mr. Day: Mr. Fleming knows right now there is a ruling suppressing the evidence.

Mr. Fleming: Not the fact that an investigation was made.

* * * * *

(237) The Court: * * * You may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves until such time as the case is given to you for deliberation and verdict.

I again call your attention to the subject of newspaper, radio and television. Make your best effort to avoid reading, hearing, or seeing as it relates to this particular trial, again for the (238) reason that each of the witnesses testifies here under oath. You are getting it

firsthand. Regardless of the accuracy of the media, it is still the interpretation of the writers, and the writers can't possibly be as accurate as you ladies and gentlemen here in open court.

Thank you very much, * * *

* * * * *

(495) The Court: All right. Fine. Ladies and gentlemen, we will take our lunch recess at this time. You are not permitted to discuss this matter with anyone, permit no one to discuss it with you. Do not discuss it amongst yourselves until such time as the matter is given to you for deliberation and verdict.

We will reconvene at 1:30 this afternoon.

(Thereupon at 11:45 a.m. an adjournment was taken until 1:30 p.m.)

* * * * *

(524) The Court: Ladies and gentlemen, we will enjoy our afternoon recess. I call to your attention the admonition previously given.

(Recess.)

* * * * *

(571) The Court: * * * I call your attention to the fact that you may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves, until such time as the case is given to you for deliberation and verdict.

Thank you. We are adjourned.

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DIRECT EXAMINATION OF THOMAS DEVER.

* * * * *

(624) Q. And in that connection I will ask you, sir, can you tell us what is numbers or clearing house? A. What is clearing house?

Q. Yes. A. Clearing house is a scheme of chance where a person wagers a certain amount of money, wagering on a certain number, anywhere from zero, zero, zero, to nine, nine, nine, a total of a thousand numbers. He wagers a certain amount, and if he has the winning number he gets paid the odds, generally speaking, of five hundred to one.

Q. Five hundred to one. Can he bet one penny? A. Yes, sir.

Q. And about how far up do they usually go? A. Well, from time to time there is put a limit on the amount that is bet. Sometimes it is a two dollar limit, sometimes a five dollar limit.

Q. And if a person bet five dollars and won, what would he receive?

Mr. Garmone: If the Court please, we will interpose at this point of the examination an objection. The subject matter certainly has no relevance.

* * * * *

(625) The Court: For the record, the objection is overruled.

Mr. Day: The defendant's objection to this line of questioning of this witness, in addition to its lack of relevancy heretofore indicated by Mr. Garmone, also rests on a proposition that it is prejudicial and that all that needs to be shown in (626) order for the State to make its case is that there was a pending indictment, which the record already abundantly shows.

It is the feeling of the defense, and the contention of the defense, that to go into detail simply puts this defendant on trial for another matter which is not the object of the current litigation.

* * * * *

(627) The Court: You may proceed, Mr. Monck.

Q. If a person bets five cents on a number how much would he get?

(628) Mr. Garmone: Objection. Not related to the subject matter at all, under any circumstances. The count as alleged in the indictment, and in conversation just completed at the Court bench—

The Court: Mr. Monck, it is admitted that he would join together the relevancy of the subject he is now pursuing as it relates to the case that is now before the Court.

The objection is overruled, although I hold you to your promise, Mr. Monck.

Mr. Monck: I will make it very brief, Judge.

A. If he bet five cents and had the winning number he would get paid twenty-five dollars, if it is five hundred to one, and sometimes it is reduced odds.

Q. What is the person called with whom he places the bet, if he desires to make such a bet? A. The person is called a writer.

Q. And where generally are these bets placed with writers? A. Almost anywhere.

Mr. Garmone: If the Court please, without being on my feet, and without interrupting, which is not what I want to do, I think that the defendant, through Mr. Day and myself, is entitled to have this record show a continuing objection throughout this (629) entire period of examination, through questions by Mr. Monck, and answers by Sergeant Dever.

* * * * *

The Court: The defense has a continuing objection to this line of questioning. You may proceed.

* * * * *

(634) A. Defendant Alex Birns and Edward Keeling.

Q. And what did they have with them at that time? A. In the office with them?

Q. Yes.

Mr. Garmone: Objection to any further questioning on the subject matter beyond the point of 5715, that he visited the office, and that his observation disclosed that Edward Keeling and Alexander Birns were present.

The Court must realize this—

Mr. Fleming: Objection.

Mr. Garmone: Just a minute.

Mr. Fleming: May we approach the bench?

* * * * *

(635) The Court: You may state your objection in open court.

Mr. Garmone: This matter was tried in its preliminary stage Honorable Judge Hugh A. Corrigan in this very courthouse.

* * * * *

Mr. Garmone: Anything that transpired at this address was suppressed by the Honorable Judge Hugh Corrigan, and for that reason any testimony relating to what transpired there, besides the physical setup at 5715, real property set up at 5715 Brookpark Road, is certainly not admissible, and if it would be permitted to be given to this jury would be highly prejudicial to the rights of this defendant in this case.

* * * * *

(639) The Court: * * * Will you proceed, Mr. Monck, with the thought in mind of the admonishment that I have given you, the point at which I would wish that you would stop.

Mr. Monck: Thank you very much, your Honor.

Q. Now, what was in the room with Mr. Birns and Mr. Keeling at that particular time? A. There was clearing house bet slips, two adding machines, hit and remit books, paper clips, pencils, rubber bands, paper bags, money, telephones, a couple of desks.

Q. And was Mr. Birns then arrested by the police at that place on that day? A. Yes, he was.

Q. And was he subsequently indicted by the grand jury of this county for operating a clearing house in violation of the law.

Mr. Day: Objection. It calls for (640) a legal conclusion.

Q. Was he subsequently indicted?

Mr. Day: The indictment is in evidence.

Mr. Monck: Not in this case.

Mr. Day: At the very beginning, it seems to me, we stipulated the indictment was July 28th.

Mr. Fleming: The indictment is not in evidence.

Mr. Day: The stipulation of the date of the indictment.

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DIRECT EXAMINATON OF ALEXANDER BIRNS.

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(719) Q. I see. And when you went there what was Mr. Keeling doing, if anything? A. May I ask the judge a question before I answer that, or ask my lawyer?

Mr. Fleming: Your Honor—

The Court: Just a moment.

Mr. Day: We will object to that, your Honor, on the ground it is not a pertinent matter before the Court. It has been established there was an arrest, it has been established there was an indictment following the arrest. The details are unimportant, irrelevant, and moreover all the evidence has been suppressed because of its illegal acquisition by the police.

* * * * *

Mr. Day: For the record, I object to any further questions along the line of other financial income, or any detail of any gambling operation, or (720) for any other source of financial income, for the reason

that defendant Birns is now under investigation by a Federal grand jury and any questions along this line might tend to incriminate him and would have the effect of forcing him to assert the privilege in open court, in effect violating the dictum of Mulloy vs. Hogan and Murphy vs. Water Front Commission, and the constitutional provisions against requiring a defendant to assert the privilege in front of a jury, or bringing it to the jury's attention.

* * * * *

(721) The Court: Ladies and gentlemen of the jury, the question generally was what was Mr. Keeling doing when Mr. Birns got there. Those aren't the exact words. There was an objection by the defense, and the objection is sustained. You may proceed, Mr. Fleming.

Q. Mr. Birns, on the 23rd of July, 1964, was this the first occasion you had to visit 5715 Brookpark Road?

Mr. Day: Objection.

The Court: Overruled.

A. I was there on a couple of previous occasions.

Q. When was the time before July 23rd that you had been there?

Mr. Day: If the Court please, may I have a continuing objection to this line of questioning on both the relevance grounds and the Constitutional grounds which I have already read into the record?

The Court: Yes.

* * * * *

(723) Mr. Day: If it please the Court, I now want a recess so I can instruct my client. I think we are getting into an area that may put him in danger of self-incrimination conceivably, and if there is any tendency to do it we are entitled to advise him. I think we are entitled to do it outside the presence of the jury.

The Court: I am conscious of the self-incrimination question, Mr. Day, but it appears to me that if the prosecution's questioning is along the line of what his income is there isn't anything improper or incriminating about it.

Mr. Day: But he is being investigated in Federal Court.

The Court: What are we supposed to do about that?

Mr. Day: He has a right to assert (724) the privilege. All I am saying is that I have a right to advise him of that, and I think I have the right to do it out of the presence of the jury.

Mr. Fleming: Before he took the stand you told someone, apparently, Friday, that you were going to put him on the stand today.

Mr. Day: I didn't tell anybody that.

Mr. Fleming: I am sorry, Jack. It was in the paper that he was going to be the first witness, but at any rate, if every time a question comes up as to whether or not he should tell the truth or take the Fifth—

Mr. Day: But these are not the only alternatives. Taking the Fifth is not necessarily juxtaposed to telling the truth. Taking the Fifth doesn't indicate untruth, and I think that if we are forced to assert the Fifth in open court it is error, but if I am forced to I will.

The Court: I don't know how you can just recess a trial so that you can advise someone not to answer a question, or advise him of his rights so that he can decide what he should answer to a question, because it wouldn't be one question, it could be a number of questions.

The only issue as I see it is that the defendant (725) has testified that he had but one source of income, namely, these businesses as he has had them down through the years, from '45 to '65, and so long as the prosecutor wants to seek questions on his income as affecting the question—

Mr. Day: I don't mind him seeking them, but we have a right to make the assertion, and I don't think we ought to put the defendant to the choice of either being advised in open court of his rights, or letting him stand naked to the wind on this kind of thing, because there is a pending grand jury investigation in Federal Court.

The Court: I understand, but the prosecution suggests to me that they would like to continue their examination.

Mr. Day: I can assure you, if I have to say it in open court, he is not going to get what he is after, and what he does get is the ill effect on the defendant of asserting the privilege, which I say is an unconstitutional objective.

* * * * *

(726) The Court: I am going to overrule your objection and have a brief recess.

* * * * *

(728) The Court: Please proceed, Mr. Fleming.

Q. Now, on the first occasion when you went there did you take something with you, other than money?

Mr. Day: Objection, if the Court please. Again I want to make a continuing objection.

The Court: The question was answered yes, I am sure.

Mr. Day: He said on the first occasion.

Mr. Garmone: The question was never asked about the first occasion.

Mr. Fleming: I am asking now.

The Court: Excuse me. You are objecting to the question?

(729) Mr. Day: I am objecting to the question, and while I am on my feet, sir, I think any question which goes to the specifics of July 23, 1964, and that particular arrest is not proper because that evidence has been suppressed and stands suppressed in this

Court now, and no fruit of that illegal search can be utilized by the prosecution for any purpose, and I want the record to reflect my view on that score, and the position of the defense.

The Court: Is there something different about your objection now as opposed to the objection that you made previously? I understand your point, and you have a continuing objection on that point.

Mr. Day: Out of a superabundance of caution I was delineating my objection.

The Court: As it relates to your objection to this question it is overruled, and your general continuing objection is noted in the record.

Mr. Day: It is noted in the record, and the same reasons apply to the continuing objection, if the Court please.

The Court: Yes. I am going to permit questions on the basis of credibility, Mr. Day. You may proceed, Mr. Fleming.

* * * * *

(730) The Witness: I have a tax investigation pending at this time. I am certainly not going to answer him any questions in reference to these things.

The Court: Mr. Birns, let us understand something. You can't ask me a question.

The Witness: I will refuse to answer the question, then.

The Court: And I can't give you any answers, but you have a perfect right to refuse to (731) answer questions as you see fit, that may be asked by Mr. Fleming.

The Witness: I refuse to answer the question.

Mr. Monck: On what grounds?

The Court: What is the reason that you refuse to answer the question?

The Witness: Because there is a tax investigation at the present time and I refuse to answer these questions because they may tend to reflect on that tax investigation.

The Court: In other words, incriminate you?

The Witness: That is correct.

The Court: All right, Mr. Fleming. Does that answer your question, Mr. Monck?

Mr. Monck: Yes. Thank you, Judge.

Q. On the second occasion that you went there did you take anything with you other than the money? A. I answered that question, I believe. Didn't I answer that question?

Q. We were talking about the first occasion. A. Well, I would refuse to answer any questions in regard to that situation on the grounds that it may tend to incriminate in this present tax investigation.

(732) Q. I see. And I would imagine that you would refuse to answer what you did on the third occasion for the same reason; is that correct? A. I refuse to answer that question on the same ground.

Q. But you did go there on the three occasions to loan Mr. Keeling some money, didn't you? A. I'll refuse to answer any question in reference to that.

* * * * *

(799) Q. And these two companies are connected to each other? A. Port Wellington Quarries supplies the Ontario Stone their stone in this part of the country.

Q. I see. Now, for which of these companies do you work? Do you work for Port Wellington or Ontario? A. I refuse to answer that.

Q. On what basis, sir? A. Because I have an investigation by the Internal Revenue Department at this time pending and I am not going to go into that. The monies that I have received there reflects on my income tax.

Mr. Fleming: Your Honor, I can't see anything incriminating about that last question.

* * * * *

(814) Q. Mr. Birns, some reference has been made here by both sides, that is, counsel for the defense and the prosecution, (815) with regard to motion to suppress. You were there, weren't you? A. Yes, sir.

Q. And you were present in the courtroom when Mr. Keeling said that he was operating some tapes with regard to clearing house, under oath, weren't you?

Mr. Garmone: Objection.

The Court: What is the basis of your objection?

Mr. Garmone: Objection for the record this time, and ask the Court to rule on it.

The Court: You can answer that question yes or no. Were you in the courtroom when that hearing was had on that motion?

* * * * *

(840) The Court: * * * we will recess at this time for the evening.

I call to your attention the fact that you may not discuss this matter with anyone, permit no one to discuss it with you, do not discuss it amongst yourselves until such time as the case is given to you for deliberation and verdict.

Thank you for your patience. You are excused.

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DIRECT EXAMINATION OF THOMAS DEVER.

* * * * *

(877) Q. And what, if anything, do brown paper bags have to do with the operation of clearing house?

* * * * *

(878) (Pending question read.)

Mr. Day: Objection.

The Court: Overruled. You may answer.

A. Brown paper bags are used to carry clearing house bet slips to a clearing house office. They are also used to

store the bet slips for three days after the current date, at the clearing house, in either foot lockers or metal tool cabinets.

Q. And why are paper bags used?

Mr. Garmone: Objection, if the Court please.

The Court: Objection is overruled.

Mr. Garmone: I would like the record to show that I am now making a motion that the Court declare a mistrial in this matter.

The Court: Motion is overruled, Mr. (879) Garmone.

A. Paper bags are used because the bet slips they contain are destroyed at the end of three days, and the paper bags are easily destroyable.

Q. Would you tell us about the size of the bag you saw Mr. Birns carrying? A. Well, it was about a five or ten pound paper bag.

* * * * *

(883) Mr. Day: * * * and in addition I should like the Court to note that we are raising and saving for the record the proposition that when the prosecution proceeded to question the defendant Birns about matters which at side bar, had they been advised about necessitating the invocation of the Fifth Amendment, the defense claims, and is claiming, and has not abandoned the claim, that due process (884) of law was violated in their persistence in a course which they knew could do no other than result in his being forced to assert the privilege before the jury.

* * * * *

The Court: * * * This motion similarly is overruled.

Mr. Day: * * *. The defense renews each motion for mistrial heretofore made and heretofore overruled in this case for the reason that the chance for a fair trial was

foreclosed with the insistence of the plaintiff in proceeding to ask questions which forced the defendant Birns to invoke the privilege against self-incrimination in the face of a clear warning side bar that there would be no other course open to him for reasons of contravention of due process of law.

The motions for mistrial are also founded on (885) the proposition that there has been inadmissible evidence, properly objected to and overruled, on the question of the details of the alleged crime of July 23, 1964, it being the position of the defense that nothing more was requisite to the trial of this case than the introduction of the indictment for that particular offense, and an indication of the place of security of the evidence in that case.

It is the defense's position that any reference to any of the evidence in the so-called policy case, the case which grew out of the arrest of July 23, 1964, and the indictment of July 28, 1964, any reference beyond those that I have just noted violates the proposition that the fruit of a poisoned tree, namely, the illegal search and seizure, the unlawful acquisition of evidence in the case which resulted in the indictment in 72,864, is inadmissible and subject to both motion to suppress and/or strike.

The Court: The Court has spoken on the subject that you mention now, and I will repeat briefly, Mr. Day, the Court feels that something beyond the indictment of March 23rd is necessary.

It is necessary as it relates to that alleged offense of July 23rd, that the prosecution show the participation of Detective Bennett in that July 23rd (886) event for the reason that the charge or several counts of the indictment now pending in this court relating to bribery stem from this so-called clearing house operation, and to that extent the Court has allowed evidence of the clearing house case,

and we have attempted to maintain a fine line without retrying the clearing house case.

As it relates to your renewal of each motion for mistrial, the same is carefully noted in the record and your request at this time is overruled.

Mr. Day: May the record show, so that it does not appear that we have abandoned any objection to the admission of the evidence, we claim that the admission is prejudicial error under the law of the State of Ohio.

The Court: The record will so indicate.

* * * * *

(1184) Morning Session, Tuesday, January 4, 1966.

The Court: The defendant has filed a motion for a new trial; the first branch of that motion relates to timing of publicity respecting the defendant's indictment by a Federal grand jury and the allegation that this publicity prevented a fair trial. We heard argument yesterday on this subject.

The Court has made an independent research of the applicable law, and the Court is prepared at this time to rule on that particular branch of the motion. I point out "that particular branch of the motion." There are five other branches still to be argued, still to be considered, still to be ruled upon.

The Court is of the opinion that the media, whether it be newspaper, radio or television, reported only facts which were elicited at the trial, which reporting was concise and accurate, and the reporting was made and done only as to evidence that was adduced on a daily basis in the trial; that is to say, nothing was reported prematurely.

* * * * *

(1186) The Court is of the opinion that, as it relates to this subject of publicity, the defendant was accorded a fair trial.

Mr. Day, if you will continue now with your argument as it relates to the other branches of your motion.

* * * * *

(1211) Mr. Day: * * * In the prosecution's effort to deal with a charge which was not on trial they, in effect, as I suggested, tried the man for a crime that he was not indicted for, and this offends due process, and there is a case pretty much on the question and that is Cole vs. Arkansas, 333 U. S. 196, decided in 1948.

Moreover, the rule on suppressed (1212) evidence is not that it shall not just not be used direct, but that it shall not be used at all. It can't be used directly and it can't be used indirectly.

* * * * *

(1213) Mr. Day: I have implied, without actually saying so, now I'll remove the implication and say so directly, that the Court erred in certain rulings on the admissibility of evidence.

Now, I have addressed this to particular parts of the evidence, without meaning thereby to waive any other objection that I may have saved in the record, but when Detective Sergeant Dever was allowed to testify at extreme length on the method and technique of operating the numbers game, that was gross error. That had no relevance to anything that was properly on trial in this case, and, standing alone, is a basis for upsetting the conviction.

* * * * *

(1223) I have also talked about allowing matter in evidence which, in effect, tries the defendant on another charge which is not laid in the indictment. We charge that as a specific error on the part of the Court, * * *.

* * * * *

(1237) Monday, January 10, 1966.

The Court: This is case number 81317, entitled State of Ohio vs. Alexander Birns.

* * * * *

The defendant, as a matter of right, has now filed a motion for a new trial. The motion contains some six branches. The first branch relating to publicity was previously ruled upon by the Court. That branch was overruled.

We are here this morning for a ruling as it relates now to the other five branches of the motion.

The motion for a new trial, as it relates to all branches, is overruled.

* * * * *

EXCERPTS FROM COMMON PLEAS RECORD ON MOTION FOR NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE, CASE NO. 81,317.

(585) Friday Morning Session, May 6, 1966.

The Court: This is Case No. 81317, the State of Ohio versus Alexander Birns. The defendant has filed a motion for a new trial based on newly discovered evidence. Now, such motions are directed to the sound discretion of the court * * *. To grant a motion for a new trial based on newly discovered evidence, it must appear to the court that the verdict on another trial would be different.

The issue in this case, and the issue is relatively simple, is whether or not an admitted fact that an automobile accident occurred, and the admitted fact that it was not reported at the time of the trial to the jury, would be fatal to the prosecution; or, stated in other words, had the jury known of the accident, would a different result have obtained.

The court is of the opinion that this is not (586) so; the same result would have obtained.

Based on that fact, the court overrules the defendant's motion for a new trial based on newly discovered evidence.

* * * * *

MOTION FOR NEW TRIAL, COMMON PLEAS CASE NO. 81,317.

Now comes Defendant Alexander Birns, through his Counsel and moves the court for a new trial in this cause for the following reasons:

(1) The timing of publicity respect the defendant's indictment by a Federal Grand Jury which prevented a fair trial.

* * * * *

(5) Errors of law by the Court occurring at the trial prejudicial to the defendant in:

a. Rulings on the admissibility of evidence.

b. Denying defendant's motions to suppress.

c. Denying defendant's motions for a mistrial.

d. Denying defendant's motions for a directed verdict or direction to the jury to return a verdict for the defendant.

e. Denying defendant's motions to strike.

* * * * *

j. Allowing questions by the prosecution designed to force the defendant to assert the privilege against self-incrimination after the prosecution and court had been advised of the eventuality.

k. Ruling in a manner which deprived the defendant of rights under the Fourth, Fifth, Sixth and

Fourteenth Amendments to Constitution of the United States and comparable sections of the Ohio Constitution.

* * * * *

m. Allowing evidence of other charges against the defendant which had the effect of trying him on charges not laid in any count of the indictment for which he was on trial, contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

* * * * *

The support for the foregoing grounds for a new trial will be detailed in a brief which will be presented at the time for hearing on the motion.

Respectfully submitted,

FRED W. GARMONE,
JACK G. DAY,
Counsel for Defendant.

EXCERPTS FROM ASSIGNMENTS OF ERROR IN THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY, FIRST APPEAL, NO. 27,812.

No. 2. The trial court erred in controlling and administering the trial and interpreting the law in contravention of the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10, 14, and 16 of the Ohio Constitution in the following particulars.

(a) In allowing extensive testimony about the numbers racket and defendant's relationship to it.

(b) In permitting the jury to view the premises at 5715 Brookpark Road, which view had nothing

to do with the understanding of events at the Beef and Bottle Restaurant, the situs of the only events of explanatory relevance to this case.

* * * * *

(d) In allowing the prosecution to ask questions deliberately designed to force the defendant to invoke the privilege against self-incrimination in the presence of the jury.

* * * * *

No. 6. The trial court erred in overruling defendant's motion for a new trial based upon:

(a) Prejudicial publicity respecting defendant's indictment by a federal grand jury which publicity occurred after argument in the present case had begun.

* * * * *

MOTION FOR NEW TRIAL, NEWLY DISCOVERED EVIDENCE, COMMON PLEAS CASE NO. 81,317.

Now comes the Defendant pursuant to R. C. 2945.79 (F) and, through his counsel, moves the court for a new trial on the basis of newly discovered evidence material to the defendant.

The reasons such evidence was not discoverable in the exercise of reasonable diligence and was unavailable to the defendant at the time of trial will appear from the attached, supporting brief and exhibits.

Respectfully submitted,

JACK G. DAY,
Counsel for Defendant.

EXCERPTS FROM ASSIGNMENT OF ERROR IN THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, CUYAHOGA COUNTY, APPEAL FROM ORDER OVERRULING MOTION FOR NEW TRIAL ON GROUNDS OF NEWLY DISCOVERED EVIDENCE, NO. 28,002.

A. The Trial Court Erred in Refusing to Grant the Motion for a New Trial on the Basis of Newly Discovered Evidence Because

(1) Evidence developed at the hearing on the motion exposed suppression of evidence by either the prosecution or the police department of Parma or both and false testimony on behalf of the state.

* * * * *

OPINION OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, CASE NO. 27,812 and 28002.

Syllabus.

1. The defense of entrapment is not available to a defendant who creates is his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act and acts in furtherance of his own purposes. *State vs. Gutilla,* 94 Ohio App. 469.

2. Where the testimony of the defendant clearly supports in almost complete detail the necessary elements of the crime or crimes charged against him, the claim that the verdict is not supported by sufficient evidence cannot be maintained.

3. Where upon trial of a motion for a new trial on the ground of newly discovered evidence, it being claimed that the state suppressed or concealed evidence, which if

known to the defendant could have been used to challenge the credibility of a state's witness, and when the court, in overruling such motion, finds that the use of such evidence would not in all reasonable probability require or produce a different result, especially where in such case the defendant's testimony in great part supports and is not in serious conflict with the testimony of the witness whose testimony it is sought to impeach, as well as the testimony of other state's witnesses upon which the defendant was found guilty, it does not constitute error to overrule such motion.

SKEEL, *J.*

These appeals come to this Court on questions of law from a judgment entered by the trial court on the verdict of a jury finding the defendant guilty on both counts of an indictment charging him with bribery and unlawfully attempting to corrupt a witness in the discharge of his duties as a witness and as an officer of the law in the case of State vs. Birns with intent to obstruct and impede or attempt to obstruct and impede the due administration of justice.

The defendant claims the following errors:

1. In repeatedly ruling on evidence and procedure, in making comment prejudicial to the defendant in the presence of the jury, and in invading the province of the jury.

2. In controlling and administering the trial and interpreting the law in contravention of named provisions of the Federal and State Constitutions.

3. and 4. In refusing defendant's request to charge and for errors in the general charge.

5. In prohibiting defendant in defendant's final argument to claim entrapment and the court's failure to give requested charge on that subject.

6. and 7. In overruling defendant's first motion for new trial and for failure to direct a verdict for defendant.

8. and 9. The verdict is contrary to law and is not sustained by sufficient evidence, and, by separate appeal, in overruling defendant's motion for new trial based upon a claim of newly discovered evidence.

The facts as shown by the transcript, the bill of exceptions and exhibits, are that the defendant was arrested on July 23, 1964 at 5715 Brookpark Road in the City of Parma, Ohio, and charged with promoting a numbers game or lottery known as clearing house in violation of Section 2915.13, Revised Code. The case as thus charged was pending for trial on the merits on November 20, 1964.

On November 20, 1964, the defendant testified he was at the "Beef and Bottle" (a lounge bar in Parma which the record shows the defendant patronized on frequent occasions) having dinner with a girlfriend and upon leaving he saw Detective Bennett seated at the bar. He, the defendant, testified that he had only seen the officer once or twice before, one of which occasions was at the time of his arrest on July 23, 1964. After the defendant recognized the police officer, he engaged him in a conversation for more than a half hour on the subject of gambling. As set out in defendant's brief:

"There ensued an exchange of conversation and drinks during which the subject of gambling was discussed * * *. Defendant told Bennett that the Cleveland Press ran the requisite information to determine the

winners in clearing house but only in editions delivered on the east side of town. * * *."

Defendant testified that the officer was amazed to know that he (Birns) was correct in his statement and that the defendant offered to demonstrate the truth thereof by bringing out papers for the officer to examine purchased at several locations. Defendant then arranged that he would call the officer the following week and bring the papers with him to demonstrate the truth of his statement. The meeting was to be at the Beef and Bottle.

The defendant called Detective Bennett at the station house on Monday (November 23, 1964) at about 3:00 P.M. and said he had the newspapers. They agreed to meet at the Beef and Bottle at about 7:45 P.M. Detective Bennett, with Detective Eschweiler, then equipped themselves with sound equipment to record the conversation between the defendant and Bennett, Eschweiler to listen in his automobile at the side of the restaurant and to attempt to record the conversation on a tape recorder. When the defendant reached the restaurant on November 23 at about 8:15 P.M., Bennett was sitting at the bar. The defendant testified that they had five, six or seven drinks and that he showed the newspapers to Bennett who was amazed. The defendant expressed his philosophy on the subject of gambling, that is, that it was not morally wrong to gamble, and that everybody engages in such conduct. After continuing the conversation, the defendant testified Bennett said:

" 'You know' he says, 'I have got four and a half or five and a half kids and I'm only making $6500 a year.'

Defendant further testified:

"That didn't sound good to me. I thought maybe at that moment, why would he tell me—I'm thinking

like this, why would he tell me he has got five and a half kids and making $6500 because there was nothing incriminating said, in all my conversation at the bar and I was wondering about that and I then sent for the waitress to bring a menu because I didn't have dinner yet and when the waitress brought the menu, just trying to be polite, I says 'Mr. Bennett, I am going to eat. Would you care to eat or dine with me?' He said, 'Yes, I would love to.'
* * *"

When the salads were on the table, the defendant stated:

"I went first. Mr. Bennett came about twenty to twenty-five seconds later. He came to the table and sat down. * * * Well when he sat down, then I was thinking about his five and one half kids that he mentioned and only making $6500 a year. I says 'Look, here is a Christmas gift for your family so they will have a nice Christmas.' He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' I says 'Nothing.' I says 'I wouldn't want you to jeopardize your family or your kids or your job.' "

The defendant testified he laid the two hundred dollars on the table for Bennett. He also testified that after some general conversation that Bennett went to the men's room. After he came back, he laid the money on the table and said "Now, Shon, tell me what you want me to do for this two hundred dollars." The defendant answered "Nothing. I have told you before that I didn't want you to jeopardize your family, your job or your kids." When pressed further as to what was expected of the police officer who, under the circumstances, was not satisfied with defendant's explanation, defendant said "Look, if you can be helpful O.K." After further con-

versation on this subject, a man walked slowly toward the table and Bennett said "Hello Frank—are you working tonight?" (This was Eschweiler.) The defendant then testified that all this didn't look good to him. He said "Look, I am getting out of here." He got his coat to leave and was then arrested.

The testimony of the defendant in attempting to explain how he came to give Bennett two hundred dollars (as an alleged Christmas gift on the 23rd of November, with Christmas more than a month away) when he knew that Bennett (an almost total stranger to him) was a potential or probable witness for the State in the numbers case then pending against him, was, with the exception of a few minor details, completely corroborated by Bennett. The officer's testimony on the discussion about his family was to the effect that he had just taken pictures of his children which he displayed to Birns who then inquired about his family. Bennett, besides his work as a police officer, was in the photography business with his wife in Parma.

On the state of the record, including Birns' testimony, the issue of the defendant's guilt on either or both charges is clearly supported. The purpose of the defendant in giving one known to him as a police officer who participated in his arrest on a numbers charge, which case was then pending for trial on the merits, it being undisputed that until his arrest, the officer was a total stranger to him, and where there was no indication or the slightest suggestion of solicitation, for one under such circumstances to seek the company of the officer for the purpose of explaining his philosophy on the subject of gambling and without more, give such officer two hundred dollars in cash, with the statement "Look, here is a Christmas gift for your family so they will have a nice Christmas"

is sufficient to support a guilty verdict. This evidence being given by the defendant (who has served time in a tax evasion case and in a number of other cases) also disclosed that the officer was taken by surprise when the money was offered, when he, the defendant, testified: "He looked at me and he says 'Gee.' He hesitated. He says 'Gee Whiz. What am I supposed to do for this?' "

On the face of such a record, the defendant's claim of error No. 5 must be overruled, there being no evidence to suggest even entrapment. The court was correct in refusing to charge the law on that subject. Also, for the reasons set out above, claimed errors Nos. 6, 7, 8 and 9 must be overruled.

The defense of entrapment is not available to a defendant who creates in his own mind (without inducement by another seeking to entrap him into committing an unlawful act) the purpose to commit a criminal act and acts in furtherance of his own purpose. *State v. Gutilla*, 94 Ohio App. 469.

Assignment of error No. 1 is concerned with matters of procedure.

In considering the fact situation, the conclusions reached are based not only on the testimony of Detective Bennett, corroborated by the defendant's testimony, but also that of Officer Eschweiler, who had been assigned to the duty of listening to the conversation between the defendant and Bennett over certain electronic equipment. After the defendant had insisted on carrying on a discourse on gambling with an arresting officer in the numbers case, the police officer involved, either with or without the orders of the Chief of Police of the City, but at least with his knowledge and consent, took steps to use the electronic device of the City for transmitting conversations to others at a distance. Bennett concealed the

transmitter on his person and the receiver, with a tape recorder, was placed in Eschweiler's personal automobile which was parked near the Beef and Bottle Restaurant on Pearl Road. The testimony is uncontradicted that the conversation between Birns and Bennett was clearly received and understood by Eschweiler but that the tape recording was garbled and not understandable because of the use of improper equipment. It picked up street noises and the police radio. The jury was permitted to hear the tape with the use of earphones so that they were completely informed as to the conditions of the tape.

One other factor brought out in the record is that when Birns was arrested on July 23rd, there was, in the place where he was arrested, equipment used in conducting a numbers lottery, including tapes and money found in Birns' hat. Such property was not offered or received in evidence in this case. There is no doubt but that Birns brought into the case the matter of his involvement in numbers operations so that evidence as to the manner in which such a lottery is operated was clearly proper.

On the motion for new trial because of newly discovered evidence, it was disclosed that while Detective Eschweiler was in his private automobile listening to the conversation between Detective Bennett and the defendant, one Donald E. Hale, driving his automobile on Ridgefield Road, ran into and struck the automobile in which Eschweiler was seated listening to the Bennett-Birns conversation. Eschweiler got out of his car, talked with Hale about the damage, and testified that he called the station for an officer to investigate the accident and that Officer Henry Gabriel responded in a very few minutes and took charge of the investigation as is shown by said Officer's activity report filed in the Parma Police Department November 23, 1964.

The basis of this motion for new trial is that the State did not bring the incident of this collision to the attention of the defendant, thereby depriving him of due process. Such claim is based on the alleged fact that since Eschweiler's testimony was corroboratory in character and as the evidence of the defendant tends to show that the accident happened while Eschweiler was listening to Birns and Bennett over the electronic transmitter, and that he left his listening post in his automobile for from twenty-five to forty-five minutes to investigate the accident, if the fact of the accident had not been concealed, it could have been presented to the jury to challenge Eschweiler's credibility. The State's evidence, as shown by many reliable factors, is that Eschweiler did not leave his listening post for a period of time not to exceed five minutes and that the parts of the conversation to which he testified, he had heard over the transmitter. The court, in overruling defendant's motion for a new trial on the ground of newly discovered evidence, stated that the facts as it found them to be if presented to the jury, would not within reasonable probability cause the jury to come to a different result. The credible evidence on the collision, as shown by the record, clearly supports such result.

One other factor requires this result. The defendant's testimony is not in serious conflict either with that of Bennett who participated in the conversation with Birns or that of Eschweiler who listened over the broadcasting equipment. In addition to what the defendant testified on direct examination, as above set out, he testified on cross-examination as follows:

> "Q. My question is this, sir: When you bought those papers did you buy them so that you could take them to the Beef & Bottle and show them to Detective Bennett?

"A. That is correct.

"Q. That was the only reason—you bought them?

"A. That is right.

"Q. And on the night in question when you came in the Beef & Bottle with those newspapers under your arm, your intention was to show these papers to Bennett and explain them to him with regard to the clearing house digits; is that correct?

"A. I brought those papers out to show him that his area didn't carry it and the other area did.

"Q. I see. At that time did you have any intentions of giving him a Christmas present?

"A. No.

"Q. When you went inside the bar and saw him there at the bar, and discussed with him showing him the manner the number was picked, the stocks and bonds, and so forth, at that time did you have any intentions of giving him a Christmas present?

"A. No.

"Q. How much money did you take with you when you went there?

"A. You mean how much money do I carry with me?

"Q. My question is, how much money did you have in your pocket on the 23rd of November, 1964, when you went to the Beef & Bottle to meet Detective Bennett?

"A. Well, I don't recall exactly what I had, but I had money with me.

"Q. Can you approximate how much money you had in your pocket?

"A. I could have had four or five hundred dollars.

"Q. Four or five hundred dollars?

"A. Yes.

"Q. Now, the twenty tens that you gave Detective Bennett, did you have them in a bundle?

"A. I had them with my other money.

"Q. But did you have this separated from your other money?

"A. No, sir.

"Q. Then when you gave Detective Bennett this money how did you know you gave him two hundred dollars?

"A. Well, he wasn't at the table. I proceeded to the table first. It took him about twenty to twenty-five seconds to come back after that, and the only reason I done that is when he started telling me that he had four and a half or five and a half kids, and only—emphasized the word 'only'—making sixty-five hundred dollars a year.

"Q. No, my question is this, sir: I believe the testimony is that you threw twenty ten dollar bills to Detective Bennett there at the table. Now, you have told us that you had about five hundred or some odd dollars in your pocket. When did you separate the two hundred dollars that you gave Bennett in the Beef & Bottle, if at all?

"A. Well, I just told you that I got to the table first.

"Q. What did you do when you got to the table first?

"A. I went into my pocket and counted out two hundred dollars.

"Q. I see. In other words, at that point, when you were there at the booth and as Detective Bennett was behind you—

"A. Not as Detective Bennett was behind me. He was at the table yet.

"Q. But you don't know where he was?

"A. He could have been giving a few more signals. I wouldn't know.

"Q. Well, let's understand each other.

"A. I understand.

"Q. You and Detective Bennett were standing at the bar; is that correct?

"A. We were.

"Q. And you left the bar first and went to your booth; is that correct?

"A. I can explain that to you, too. When I got—I'm going to explain it so you understand. I just can't give you a yes answer. I want to explain it.

"Q. Go ahead.

"A. We was at the bar. We had our five or six drinks. I was through having conversation with him at that time. I ordered some food from the waitress, and only out of politeness I asked him would he care to have something to eat. That is all there was. He had not accepted the food you would never have heard anything about this, but before I got to the table he started telling me about his family and his kids, and to me, the way he said it, 'I'm only making sixty-five hundred dollars a year,' to me it looked like a beg.

"Q. I see. At any rate, when you left the bar first to go to your booth, that is when you separated the money?

"A. That is when I counted the money out.

"Q. Yes. And you don't know where Detective Bennett was at that time because your attention was directed to counting the money, wasn't it?

"A. No, I didn't see him in my presence. I didn't count the money in his presence because he wasn't there.

"Q. And then when you sat down did you have this money in your hand or had you put it back in your pocket?

"A. I had that money in my hand.

"Q. And you held this money in your hand during the time of the preliminary conversation with Detective Bennett at the booth?

"A. No. Just a minute. When he sat down, the salads are on the table. That is when I took the money and I laid it down on the table. I said, 'This is a Christmas gift for your kids and your wife. See that they have a nice holiday,' because I didn't know he had five and a half kids and only making sixty-five hundred dollars, unless he told me. I thought it was

a beg, so I thought it was holiday time, so I says, 'Here, have your family have a nice Christmas.' There was nothing said at the bar in reference to anything incriminating, but when he got that money, that is when all his—the things started."

As thus stated by the defendant, it is clear that the State's case is supported by the defendant's own testimony and upon such evidence, the case was correctly submitted to the jury. The absence of Eschweiler from his listening post for five minutes or less, when the conversation covered a period of time from about 8:15 to 9:30 P.M., was not, upon the record as above stated, a factor preventing defendant from being afforded due process according to law. The motion for a new trial on the ground of newly discovered evidence was, therefore, properly overruled.

For the reasons stated, the judgments are affirmed.

CORRIGAN, *P.J.* concurs.

WASSERMAN, *J.* concurs in the judgment only.

JOURNAL ENTRY OF THE COURT OF APPEALS OF CUYAHOGA COUNTY, CASE NOS. 27,812 and 28,002.

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties; and upon consideration of all of the errors assigned, the Court finds no error prejudicial to the appellant and therefore the judgment of the Court of Common Pleas is affirmed. See opinion. It is ordered that appellee recover of the appellant its costs herein expended.

It is further ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO, COURT OF APPEALS NOS. 27,812 and 28,002.

The appellant, defendant in the Common Pleas Court, hereby gives notice of appeal to the Supreme Court of Ohio from a judgment rendered by the Court of Appeals of Cuyahoga County, Ohio, on the ___ day of _____, 1967 affirming the judgment of conviction of the appellant for a felony.

Said appeal is on questions of law, involves substantial constitutional questions, and is taken to the Supreme Court of Ohio:

(a) Upon appeal of right, based on violations of the Due Process clause of Amendment XIV to the Constitution of the United States;

and

(b) On condition that a motion for leave to appeal, this being a felony case, be allowed by the Supreme Court of Ohio.

JACK G. DAY,
Counsel for Defendant-Appellant.

EXCERPTS FROM DEFENDANT-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION IN THE SUPREME COURT OF OHIO, CASE NOS. 41,013 and 41,014.

QUESTIONS OF LAW PRESENTED.

I.

Were Amendments IV and XIV of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution violated when the trial court permitted a view of the scene and extensive testimony relating to evidence suppressed in another case and the Defendant-Appellant's activity in that case?

The Court of Appeals answered the question "NO." Defendant-Appellant contends the question is properly answered "YES."

* * * * *

III.

Were Amendments V, VI, and XIV of the United States Constitution and Article I, Sections 10 and 16 of the Ohio Constitution violated when the trial court allowed the prosecution to ask the Defendant-Appellant questions unrelated to the issues on trial in order to deliberately force him to invoke the privilege against self-incrimination in the presence of the jury.

The Court of Appeals did not answer the question. Defendant-Appellant contends the question is properly answered "YES."

IV.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated by prejudicial publicity, accumulating during the trial and capped by a final lurid headline, respecting Defendant-Appellant's federal indictment for perjury, occurring after final summation on the trial of the present case had begun.

The Court of Appeals did not answer the question. Defendant-Appellant contends the question is properly answered "YES."

V.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated when the prosecution and police suppressed the fact that while a detective, a state corroborating witness, was allegedly in an automobile monitoring a conversation

which the State claims is the prime basis for the charge against the Defendant-Appellant, the monitoring automobile was struck by another and the detective was out of the automobile for a period during which he had represented to the jury that he was carrying on monitoring activity?

The Court of Appeals did not meet the constitution question squarely. The Defendant-Appellant contends the question is properly answered "YES."

VI.

Were Amendment XIV of the United States Constitution and Article I, Section 16 of the Ohio Constitution violated when the trial court failed to make finding beyond a reasonable doubt that the suppressed information would not have caused the jury to reach a different result?

The Court of Appeals did not consider the precise question but apparently considered it constitutionally adequate to find that "within reasonable probability" the jury would have come to "a different result." The Defendant-Appellant contends the question is properly answered "YES."

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEALS, CASE NOS. 41,013 and 41,014.

(Entered June 28, 1967.)

These causes, here on appeal as of right from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeals for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF OHIO OVERRULING MOTIONS FOR LEAVE TO APPEAL, CASE NOS. 41,013 and 41,014.

(Entered June 28, 1967.)

It is ordered by the Court that these motions are overruled.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING, CASE NOS. 41,013 and 41014.

(Entered July 26, 1967.)

It is ordered by the court that rehearing in these cases be denied.